

## POLITICS, THE CONSTITUTION, AND THE NEW FORMALISM

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My Dear Student:

The other day you broached the idea that constitutional law is “just politics.” You described your comment as “realistic.” Ever since our discussion, I have wanted to amplify my response. I can give you some books, but in the meantime here is my preface.

I told you that I am sympathetic to your idea, “but . . . .” On reflection, it seems to me that the “buts” outweigh the general proposition. I’m tempted to say that “constitutional law isn’t politics, but . . . .” In either case, the qualifications are crucial.

First an aside. Most of the decisions in your casebook are hard cases at the periphery of doctrine. Hard cases force you to think about the contours of the doctrines; you learn more about the nuances of free speech by discussing *Miller* and *Schenck* than by denouncing the Inquisition. Nevertheless, I have some qualms. By concentrating on the periphery, we tend to trivialize the Bill of Rights. Its chief significance is not what it says about Mr. Cohen’s jacket. From that perspective, it might be preferable to study the Inquisition.

There’s also something to be said for studying easy cases. In other fields, we usually learn by beginning with the simple and working gradually toward the complex. Law schools force us to reverse this natural sequence: you read a tough case and try to infer what are the easy cases. In Constitutional Law, this usually isn’t too difficult. But there’s a third problem. At the periphery, most constitutional doctrines are a muddle of confusion and inconsistency. Casebooks, devoted to the periphery, create the impression that there’s no law in constitutional law. This impression is enhanced by our teaching method, which inculcates radical skepticism about all claims to legal truth. “If there’s no law,” you may think, “it must all be politics.” But most constitutional questions are simpler than the ones in the casebooks, and at any given time they

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usually have a fairly clear answer. Justices Brennan and Rehnquist would agree about the answers to most of the man in the street's constitutional questions. It is only in the hardest cases that they so often disagree. (If you doubt this, consider the fact that the Justices unanimously agree in seventy percent of all docketed cases that the questions presented do not even deserve conference discussion.)

## I

The idea that constitutional law is politics expresses several important truths. You know that Presidents select Justices for political (though not necessarily ideological) reasons; that constitutional cases often involve controversial questions of public policy; and that a judge's attitude toward these questions is usually strongly colored by his or her political orientation. Like politicians, the Justices must choose among conflicting values. Like a legislature, the Court waffles and compromises when it is ambivalent. Like serious politicians, the Justices should care about the social consequences of their decisions. Like all politicians, they take account of public opinion, though with life tenure they are freer to take unpopular positions, as in *Lochner* and school busing, and they sometimes wield power long after the political climate in which they were appointed has changed.

Scholarly interest in the political aspect of law originated as a rebellion against the simplicities of the traditional theory of law as an impersonal set of rules that judges look up. Like all intellectual rebellions, it ran the risk of replacing one oversimplification with another. The political side of constitutional law, though fundamental, is only one side. Again, we scholars have not always emphasized the legal side, perhaps because it seems too obvious. We do discuss doctrinal consistency, of course, especially in law school. But those discussions are often more calculated to erode than to inculcate respect for the Court's legal function. That function is not solely a matter of respect for precedent; it has more basic aspects. As you know, the Justices usually do not take instructions—or even advice—about individual cases from their political allies in the other branches of government. On the rare occasions when we detect something close to this, we condemn it. If constitutional law were simply politics, a Justice would know that failure to vote with his party might be penalized; he might be assigned nothing but water law opinions for the rest of his career. In some foreign systems, analogous things have happened. President Plutarco Calles of Mexico ward off intervention by the United States Marines by agreeing to rescind the expropriation of American oil companies'

property. Afraid to take responsibility for cancelling the popular expropriation decrees, he instructed the Mexican Supreme Court to solve the problem. The court obligingly declared unconstitutional those portions of the petroleum law that limited pre-1917 concessions to fifty years. To say that constitutional law "is politics" implies an indifference to whether our Court functions in this way.

By the same token, if constitutional law were just politics, individual Justices would regularly cast their votes so as to advance their political careers. But allegations of such behavior are rare, and few Justices even aspire to post-Court careers.

Another difference between constitutional law and politics is that all of the Justices believe in a certain kind of impartiality: once a Justice decides, say, that there is a constitutional right to make campaign contributions, she will take the same position in the next case raising that issue, even if the next case involves a member of the opposing party. In this extremely important sense, the Court does indeed apply "neutral principles." Politicians sometimes behave even-handedly, but what we think of as political conduct is quite different. For politicians, party loyalty is common; for judges, it is exceptional. To be sure, ideological bias often influences a Justice's initial commitment to a legal rule, but such bias is much less decisive in determining how he or she votes in cases involving application of the rule. A judge may bend a rule from time to time, usually out of sympathy for a litigant rather than partisan "political" loyalty. But even this is unusual. More commonly, judges believe that freedom is indivisible, that if Democrats and fascists are to speak freely, Republicans and communists must be allowed the same right.

The very nature of the judicial system affects the wisdom—the political wisdom, if you like—of constitutional decisions. Judging has a political element, but it is also a craft. That, of course, is also true of such undoubtedly political activities as diplomacy and legislating.

Let me give an illustration from the standing cases that you read in the course. If you will study the various opinions in *Flast* and *Valley Forge*, I think you will agree with me that none of the other Justices did as well as Justice Harlan in enunciating a coherent and well-reasoned approach to standing. This is far from being a purely academic matter; a major function of a judicial opinion is to explain the result in a way that will enable lawyers to plan their clients' affairs. Perhaps lawyers attach too much weight to that function, and so to the intellectual quality of opinions. It would be surprising if we didn't. Still, bad opinions sometimes lead to bad

legal advice; and bad legal advice does cause problems. Judged by that criterion, Chief Justice Warren's opinion in *Flast* was poor even if you like the political implications of a lenient approach to standing.

Because I value the legal side of constitutional law, I want it to appear in our accounts of how the Court functions. To omit it is sloppy; and perhaps it is even slightly ominous. Much of what passes for realism in modern social thought is to the effect that certain ideological pillars of liberal democracy—consent, freedom, the rule of law—are mythical. As indeed they are—in part. But the difference between a partial myth and a complete myth is the difference between Abraham Lincoln and the tooth fairy. A jurist once wrote of the “normative power” of what exists, our tendency to believe that what is, is proper. If we ever accept the idea that law is nothing but politics, we may cease to be shocked by the equation. When we cease to be shocked by it, we may be ready to accept a society in which it is more nearly true.

As usual, the falsehood is in the innuendoes. To say that constitutional law is “just politics” has a dismissive innuendo. It implies that the objections to judicial activism are merely hair-splitting legalism, that the political outcomes of cases are what matter. Much can be said for the essential soundness of this position. It compares favorably, I think, with the jurisprudential platitudes of strict constructionists. I will define a strict constructionist as someone who thinks that the trouble with activist Justices is that they aren't following the Constitution. The conservatives who make this charge today are sometimes sophisticated about other matters, but their jurisprudence is naïve. They seem to believe that judging is a simple task, requiring moral integrity and common sense, but devoid of intellectual subtlety. This is nonsense. Most of the subjectivity in constitutional adjudication is inevitable. Even if the Court were to abolish substantive due process, the right to privacy, and other doctrines that lack a solid textual foundation, it would be left with an enormous residue of opportunities for judicial activism: the equal protection clause; various kinds of procedural due process; the ninth amendment; redefinitions of the meaning of “cases” and “controversies”; the contract clause; the just compensation clause; the commerce clause; the separation of powers; and so on—not to mention values such as federalism that are implicit in the constitutional design. It is true, no doubt, that activist Justices see what they want to see in these clauses; but that is less because they are activist than because they are partisan. Most activism is well

enough grounded in the Constitution to survive any purely legalistic attack.

The question whether we should obey the framers' intentions is like the question whether the War of Independence was justifiable: interesting but impractical. As you know, we often cannot tell how the framers would have responded to a modern issue—or even an old one. Sometimes, as in the case of the first amendment, their language supports a broader right than they apparently meant to create. In other cases, words like “unreasonable” (fourth amendment) or “equal” (fourteenth amendment) invite subjective interpretation. In some areas, historians periodically come up with new interpretations of the framers' attitudes.

No political faction wants constitutional law to follow the framers' intentions closely, except when its own causes are thereby advanced. Probably most of us aren't conscious hypocrites about this, but history shows that strict construction, like states' rights, is rarely valued—or abhorred—for its own sake. Any principled opponent of judicial activism would object to the freewheeling protection of property interests in some state courts, with scant textual justification in the state constitutions, but few care about that—certainly conservative polemicists have not complained. Nor have they protested the role of the United States Supreme Court under the commerce clause, striking down laws on essentially legislative grounds, with dubious warrant in the Constitution.

Furthermore, powerful arguments can be adduced in favor of going beyond the narrow intentions of the framers, in cases like *Brown* and *Baker v. Carr*, without endorsing the idea that judges should be guided simply by their political beliefs. The notion of “evolving standards” may have been invoked too often, but it is not intrinsically bad. It was Justice Holmes, not Justice Brennan, who wrote the opinion in *Missouri v. Holland*. And who would want the constitutionality of censoring *Ulysses* to turn on eighteenth-century ideas about law, sex, and literature?

## II

The Court's critics have always been inclined to describe decisions with which they disagree as usurpations. Occasionally they are right, but most bad or controversial decisions are not truly lawless. To make my argument more concrete, here's a hypothetical case. Suppose the Court were to create “a constitutional right to a decent environment” under the due process clause. (In the sixties, some environmentalists wanted precisely that.) Conservatives, we may safely assume, would attack this new right as an outrageous

usurpation, an illegitimate use of judicial power, a substitution of the Justices' own political preferences for the Constitution they are supposed to apply.

On what ground could they support such a charge? The most obvious legal argument would be that pollution, even in "excessive" amounts, does not deny anyone "life, liberty, or property without due process of law," unless these words are given a bizarre meaning.

As an original question, I would have found this argument unanswerable. However indistinct the Constitution's meaning may be, some issues are amenable to resolution in the ordinary, legalistic way, if that is what we want to do. I think this was such an issue. The clause is ambiguous, but only as to the nature of the procedural right it establishes, not as to whether it also establishes substantive rights. As Holmes might have put it, the due process clause did not enact Mr. Aldo Leopold's *Sand County Almanac*.

There are, to be sure, a couple of minor textual complexities. Respectable scholars have said that the privileges or immunities clause of the fourteenth amendment was meant to protect ill-defined substantive rights. It certainly would be stretching legal logic to use this as a basis for a right to a decent environment; and yet—once we reject the idea that the framers' immediate concerns control—there is at least a tiny foothold here for conventional legal argument. Unsound, I think, but perhaps not quite frivolous. The same can be said of the theory that new substantive rights may be grounded in the ninth amendment.

More important, the Court long ago rejected the narrow, procedural interpretation of due process. I think that the invention of substantive due process was a usurpation. But when the Court applies the doctrine today the usurpation issue is clouded by time and precedent. The wrong of a usurpation may linger on for a while, but it is steadily diluted by competing considerations of tradition and stability. Overthrow a rightful king and sooner or later you will have a new rightful king. Even if *Marbury* was a usurpation, which I doubt, it would be wrong to say that therefore all subsequent invalidations of acts of Congress were usurpations. Even if the Court's assumption of a power to nullify state legislation under the "dormant" commerce clause was a usurpation, as it certainly was from a strict constructionist perspective, no sensible critic says that therefore recent commerce decisions must be usurpations. They may be harmful; they may be based on an unwise conception of the judicial role; but they are legitimate.

Like it or not, judicial activism is self-legitimizing.<sup>1</sup> It is a legal commonplace that the decisions interpreting a statute or Constitution are part of the law that a court is bound to follow until they have been overruled; by conventional lawyers' logic, it is just as improper to ignore the cases as it is to ignore the text—more so if, as is usual, the cases bear more closely on the problem at hand. To reject this method, as the Court's critics often do, is to reject the legal model in favor of the political. (Which is ironical, since "political judging" is what the critics say they dislike.) A politician, of course, doesn't worry much about whether the legislature's treatment of Problem B is consistent in principle with its treatment last year of Problem A. His goal is to win as many battles as he can. Some Justices behave more or less the same way, and this is one of the explanations of the confused state of constitutional doctrine, today and in earlier eras. Given the passions that constitutional issues arouse, it is understandable that the Justices—"conservatives" as well as "liberals"—have often valued victory more than consistency: dealing with great public issues, one is reluctant to accept all the implications of *stare decisis*.

Until the Court is prepared to abandon substantive due process, no purely textual argument against a right to a decent environment will be tenable. Arguing against the proposed right, it would be much better to point out that the substantive due process decisions, audacious though they were, did not build a bridge between the constitutional text and a right to a decent environment. They are suggestive of some sort of libertarian right—in educational, sexual, and reproductive matters—but not of environmental rights. On this ground, one could argue that environmental rights are not a logical next step in the evolution of constitutional law. That is an accusation of bad craftsmanship, but not of illegitimacy or usurpation, at least not in any ordinary sense.

I prefer to stress a more fundamental criticism. The case against judicial imperialism rests less on conventional lawyers' logic than on a commitment to self-government. The idea that the Justices are bound by the law is one way to express that commitment, because it seeks to eliminate their discretion and confine them to a mechanical role. They are not to make law, but only to apply it. In constitutional interpretation, as you know, that attractive idea is unrealistic. (It is not wholly realistic even as applied to statutory interpretation.) A better approach, endorsed by many thoughtful scholars, is to assess the relative institutional competence of courts

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1. For a discussion of this and related themes, see Glazer, *Lawyers, the New Class, and the Constitution*, 2 CONST. COMM. 27 (1985).

and legislatures in particular fields. John Hart Ely, for example, argues that the judicial function under the Constitution ought to be confined to making democracy work, to dealing with problems that for one reason or another are unsuitable for resolution in the ordinary, political way.

Scholars like Ely are writing footnotes—in his case a magnificent footnote—to James Bradley Thayer. But they usually do not make the same argument that he did. Thayer gave a distinctive twist to the idea that judicial review is undemocratic:

[T]he power of the judiciary to disregard unconstitutional legislation . . . is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the questions out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.<sup>2</sup>

Nearly a century has passed since Thayer wrote those lines, and the literature about judicial review has become almost embarrassingly vast. Much of it is about how to reconcile judicial review with democracy. Yet Thayer's unassuming little paragraph, which seems to be about that subject, has lost little of its originality. Evidently, he was expressing a thought that does not come readily to the twentieth-century mind.

What was it? In the quoted passage, he was not drawing a bright line between just and unjust decisions, as so many have tried to do, saying "listen to me and you will learn how to apply the equal protection clause." He was not saying that judges should stick to the constitutional text, or what the framers would have wished, or principles derived from the Constitution or from our history and traditions. Nor that judicial activism squanders the Court's political capital, or is tyrannical, illicit, lawless, or unprincipled. Nor that legislatures are more responsive than judges to the people's will. Any or all of these may be true, but they are not his message. Nor did he offer the familiar syllogism that since we are a democracy, and judicial activism is undemocratic, it contradicts the premise of our system. (He knew very well that the Constitution did not create a pure democracy.) He did not seek to persuade us that activist judges are disingenuous, that they enforce their own values in the guise of constitutional interpretation. Nor that they are less competent than legislators to decide certain kinds of questions. His point was not precisely that "liberty lies in the hearts of men and women" and therefore cannot ultimately be secured by

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2. J. THAYER, O. HOLMES & F. FRANKFURTER ON JOHN MARSHALL 85-86 (1967).

courts. The passage does not say that activism invades legislative or popular prerogatives, or that it cannot be reconciled with democratic theory.

Thayer was not talking about democratic theory or legitimacy. He was talking about political sloth and liberty. Not democracy as some talismanic, formal assurance of propriety or legitimacy, but democracy as training for self-government. Not that activist judges deprive the people of their rights, but that all judges—especially activists—relieve the people of their responsibilities. It is a practical, political argument, owing more to the Greeks than to the common lawyers. We should be leery, says Thayer, of too much judicial governance, because it tends to unfit us for citizenship. Insidiously, it habituates us to petitioning a supreme law-giver, remote and un-touchable. It steers us away from the sweaty arena where coalitions are built, compromises struck, and ballots counted. It tells us that we need not deal with those outside our circle, listening to their testimony, persuading the undecided, exchanging questions and shouts, yielding an amendment here, offering a return favor there. Carried too far, it weakens the habits that sustain self-government. Like Brandeis, Thayer told us that responsibility is the forge of character, and character is the basis of freedom.

This was a radically different approach to judicial review from those with which we are familiar. In our debates, both sides assume that the issue is in some sense legal. The differences in their answers obscure the fact that they all ask the same question: what is the *legitimate* scope of judicial review? We usually assume that if a decision is substantively wise as public policy, and justifiable as a matter of constitutional interpretation, then it is good. Fifty good decisions are better than one. Accordingly, we ask what the judges are entitled to do under provisions such as the due process clause. Thayer did not deny the necessity of this inquiry, but he denied its sufficiency. What Thayer implies is that even if the Justices are entitled to intervene, in the sense that no defensible canon of legal reasoning precludes it, perhaps they should not do so. And even if they should intervene, a price must be paid. In individual cases, the price may be small; cumulatively it may be great. So if some wizard historian were to prove beyond any doubt that the framers wanted the Court to be twice as interventionist as it has ever been, even if she were to find a lost clause saying “the Justices are to rule in accordance with their values,” we should not rejoice. Government by judiciary at some point becomes bad politics even when it is good law and good legislative policy. That was Thayer’s great insight.

It is not an insight that many of us are likely to embrace. It

sounds as quaint as the blue remembered hills of Emerson's America: church spires, farm chores, town meetings. "Responsibility" and "moral education" are not words that come readily to our lips; they sound vaguely reactionary. Our messianic political culture glories in rights—the more the better. When the Supreme Court refuses to create a new right, the media treat it as a decision on the legislative merits, and not infrequently proceed to denounce it as a novel threat to our ancient liberties. Diversity, as such, is not one of our ideals. Neither is local government. Our very concept of a right is violated if a couple of backwater states do not recognize it. Born in Nebraska, reared in New Jersey, teaching in Los Angeles, the typical intellectual has no roots in a community. We want national solutions, and we want them clean, without the difficulties and compromises of legislation. We might concede that at some hypothetical point a profusion of rights would become excessive, like a toxic dose of sugar, but few are likely to believe that the law is anywhere near that point.

Are we wrong? It is difficult to tell. Thayer's argument cannot be rigorously proved or disproved. It resembles, in this respect, the idea that "the death penalty brutalizes us." Those who reject Thayer can point to the fact that the Constitution controls only a tiny fraction of our public life. It has little to do with the production and distribution of wealth, or national defense, which are after all the basic political issues. On the other hand, the courts are involved in several of the issues about which political activists care most intensely—abortion, capital punishment, church-state relations, campaign spending regulations, pornography, vulgar speech, women's rights, school busing, reverse discrimination. Even in some of the contexts where they have not yet imposed a national solution, the mere prospect that they may do so after new Justices are appointed probably induces some political lethargy.

For those of us who dislike that trend, Thayer offers a perspective that is superior in several ways to the more narrowly legalistic case for judicial restraint. In the first place, Thayer is more realistic. He does not claim that anything short of pure democracy is anomalous in America. He does not deny, as strict constructionists often seem to do, the inevitable subjective element in constitutional interpretation, but he also does not deny that at some point an interpretation is indeed too subjective. He does not brush aside the additional complexities of dealing with precedents, particularly those with which the judge does not agree. He does not ask the Justices to do something of which they are incapable: just as he recommends, some decisions seem to have been influenced by a sense of

democratic proprieties. (Admittedly, this is difficult to distinguish from other motives, especially political prudence.) In any event, one cannot rebut Thayer by citing cases where the Court ignored his advice, because Thayer (unlike the strict constructionists) was not making a conventional legal argument, and therefore had no need to distinguish precedents. In Thayer's terms the issue is political (in the best sense), and political questions—whether to go to war, whether to socialize medicine—cannot sensibly be analyzed in a legalistic manner. One does not refute a maxim of good government—fiscal integrity, for example—by showing that it has often or even usually been ignored. (Unless the “mistake” was always harmless, which is impossible to demonstrate in this context.)

This is a major difference between Thayer and the strict constructionists. Suppose, for example, that the Court refuses to establish a right to a decent environment, while also refusing to overrule *Pierce*, *Meyer*, *Griswold*, *Roe*, and other substantive due process decisions. I think that it would be foolish to applaud the Court's environmental decision on the ground that it was faithful to the framers' intent. What good would it do to follow the framers in one case? Unless the answer is reminiscent of Thayer, it will be unpersuasive. The only other justification for following the framers' intentions presumably would be legal convention (“this is how courts are supposed to interpret authoritative texts”) and social contract (“this was the covenant in 1789”). The theory, in other words, is that the Justices should follow the framers' intent because that is a rule of the game. Conventions, contracts, and rules of the game by their very nature admit of few exceptions. A rule of the game has to be followed fairly consistently or it ceases to be such. Without a massive uprooting of constitutional law, which no competent observer expects, trying to follow the framers' intentions cannot be described as a canon of constitutional jurisprudence. The Court often does so, but rarely if ever where one supposes that it would otherwise reach a different result. The framers' intentions do not appear to determine the outcomes of cases, and this is so irrespective of whether the Court is controlled by liberals or by conservatives.

A political virtue, by contrast, is not wholly vitiated by inconsistency or rarity of application. If it is good for us to fight our environmental battles in the halls of politics, then the Court can achieve that good by refusing to intervene in the political process. Its failure to show similar restraint in earlier cases is unfortunate, but does not detract from today's achievement. If the Court follows Thayer's advice in one case every ten years, that is better than nothing, just as some careful diplomacy is better than none. If the Jus-

tices ever become more restrained, they are not necessarily obliged to overrule their previous mistakes. Those transgressions are relevant to today's cases only if they are on point as legal precedents in the conventional sense; as transgressions, they are irrelevant. For conservative, Burkean reasons, the Court may decide not to overrule an excessively activist decision that has become part of the fabric of constitutional law. If it chooses that course, the old decision should not be ignored in deciding cases that are definitely within the scope of its rationale. Beyond that, the old case does not justify excessive activism today, any more than a foolish war in 1976 would justify a foolish war in 1986.

Thayer's argument would not lose its power even if all the legalistic problems were solved, for instance by a constitutional amendment that explicitly created "a right to a decent environment." A strict constructionist might object to such a proposal on substantive grounds, as by saying that it would increase the price of electricity. Apart from that, what could he say? The amendment, duly enacted, would solve the usurpation problem. Once enacted, it could reasonably be given a broad interpretation; neither its language nor its purpose would suggest the propriety of a narrow one. Thayer, on the other hand, would have had no difficulty arguing against adoption of the amendment (even if he were an environmentalist), or against an expansive interpretation of it.

Thayer's approach helps us to see that the current debate about judicial activism is much too legalistic. We deplore the "formalism" of strict constructionists, but we have our own brand of formalism—I'll call it the New Formalism. For example, some have sought to justify activism by reference to Congress's power over the jurisdiction of the Supreme Court. It would be wrong, they concede, for the Justices to lay down whatever rules they please, not bound by law, and answerable to no electoral constituency. But the Constitution itself solves this problem: article III empowers Congress to limit the Court's jurisdiction. If Congress is displeased by a decision, it may withdraw the Court's jurisdiction over that type of case. Since Congress represents the people, to be answerable to Congress is to be answerable to the people. Therefore, the argument goes, the Court is ultimately answerable to the people. It follows that the Court's role, however large and however free from legal constraints, is consistent with democracy.

There are several flaws in this argument. The Court has not yet determined whether Congress's power over its "jurisdiction" may be used to nullify specific decisions. Many scholars believe that it may not. Even if the power is broad, its exercise may create

severe practical problems.<sup>3</sup> But the most fundamental reason for rejecting this solution is that it is too legalistic. If we were discussing a contract, we might look for an agent (Congress) that could bind the principal (the people). But we are not discussing a contract; we are discussing the vigor of democracy. The question is not whether some elective body has acquiesced in judicial control. It is, rather, whether judicial control will tend to enfeeble the democratic spirit. That is a political, not a legal question. We do not answer it by citing a document, parsing a clause, tracing a line of precedents or finding a waiver of rights. We answer it by considering political realities.

If Congress has acquiesced, that is all the more reason for alarm. Politicians are only too happy to let the courts assume control of the most dangerous political issues, ones on which their constituents are sharply and intensely divided. If they can avoid it, they do not wish to be accountable to the voters on these issues. One way to try to avoid accountability is by voting against a jurisdiction-limiting bill, giving constitutional or institutional explanations, while professing sympathy for the substance of the bill. Or they may be quite sincerely troubled by the implications of limiting the Court's jurisdiction. The fundamental point remains: politicians should not be allowed to waive their proper role in our system. We may quarrel about the boundary of that role, but wherever it is, it cannot be altered by politicians who like the kitchen but not the heat. The reasons for Thayer's admonition do not become less persuasive when the legislature is apathetic, or even when the people themselves would be glad to let the courts run the country.

Excessive formalism also permeates another effort to justify judicial activism: the theory that the framers created an open-ended Constitution. In one version, the theory is that the ninth amendment was a delegation of lawmaking power to the courts.<sup>4</sup> Again, one can raise cogent legal objections to this argument, but a deeper problem exists. At most, the idea of an open-ended Constitution answers the strict constructionists; it purports to refute legalistic objections to activism based on the language and original meaning of the Constitution. It does not answer Thayer, unless the scholars are able to show that the Constitution behind the Constitution leaves no political discretion to the Justices. This, of course, is the opposite of

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3. See Auerbach, Book Review, 1 *CONST. COMM.* 137, 158-63 (1984). This review has heavily influenced my own thoughts about judicial review.

4. The ninth amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Professor Charles Black is the foremost proponent of using it as a basis for new rights. For an able response, see Van Alstyne, Book Review, 91 *YALE L.J.* 207 (1981).

what they want to show; the rights in the Constitution behind the Constitution are to be defined by the Justices. If so, they are free to follow all sorts of political thinkers, including Thayer.

The same logic applies to opaque phrases like the equal protection clause, the privileges or immunities clause, and “cases or controversies.” Trying to arrive at defensible, narrow interpretations of these clauses on the basis of their language and the framers’ intent is at best exceedingly difficult. For a Justice who respects precedent, the task is even more daunting. But it is not at all difficult to find some claims that should be rejected on Thayer’s ground.

### III

Of course, Thayer’s generalization is not a litmus test for deciding individual cases. One of the limitations of his idea—which is also one of its virtues—is that it does not purport to be a criterion for deciding individual cases. It is, rather, a criterion for assessing the tendency of the Court’s performance as a whole, not only in bad decisions, but also in those that may be justifiable from a narrowly legal point of view. Thayer did not pretend that democracy is the only valid criterion for evaluating constitutional decisions; we must also consider the text, the precedents, policy arguments. Even so, Thayer is not irrelevant to particular decisions. He helps us to frame a critical issue: is there, in this type of case, an adequate justification for removing the controversy from the regular political arena?

This is a question of degree. Thayer did not suggest that the Court should tolerate plain violations of constitutional guarantees, for instance a law forbidding “speeches and publications by Republicans.” Under *Marbury*, the courts must declare that law unconstitutional. Not only does it obviously violate the first amendment, it does so in a way that makes Thayer’s preference for democratic solutions inapplicable. For if Republicans are not allowed to make speeches, they cannot speak against the law. The law itself thus severely inhibits the political contest that Thayer envisioned.

Most cases, of course, are not so easy. One may believe, for example, that “one man, one vote” is an unwise political aspiration. If so, the Court’s reapportionment decisions went too far. But if the Court’s aspiration was wise, then judicial intervention was not an inappropriate way to attain it, because malapportionment tends to be self-perpetuating.

Following the famous footnote four in *Carolene Products*, most scholars have agreed that “discrete and insular minorities” also need judicial protection. To take an extreme case: it would have

been absurd to tell Mr. Korematsu to organize a political campaign. Given the popular attitude toward criminal defendants, the same can be said, though with less force, of Mr. Gideon. Of course, this does not necessarily mean that Gideon deserved to win his case; only that Thayer's argument was less cogent in *Gideon* than in some other cases.

Stereotypes about political disadvantage should be applied with great caution, however, even in criminal, racial and religious cases. In some contexts, minorities are on both sides of the issue: while violent criminals are disproportionately black, so are their victims. In many contexts, minorities make up for their lack of numbers by greater sensitivity and cohesiveness, or allies in the majority, or by combining with other minorities. Nobody has less power than a condemned man, yet opponents of capital punishment (like their foes) have great political power. Even in Minneapolis, most Irish Catholics or Jews may be more prosperous and better connected than most Lutherans.<sup>5</sup> Homosexuals are a minority, abhorred and persecuted since Biblical times, but between 1961 and 1986 about half the states abolished laws against homosexual sodomy.

The *Bakke* case illustrates the crudity of conventional stereotypes. One can make a pretty good argument for judicial intervention in *Bakke*, even though Bakke was not part of what we usually mean by a "discrete and insular minority." In most universities, racial minorities have a good deal of political clout—nothing wrong with that. It is relatively safe for a faculty to ignore the interests of people like Bakke—disorganized, not yet in the school, generally unaware why they were not admitted, and preoccupied with finishing their education. Some of the whites who were admitted must have sympathized with Bakke, but they too were busy, and they were closer socially and professionally to the black students who were admitted than to the whites who were not. Although he was white, male, and middle-class, Bakke was at a political disadvantage.

Of course, political disadvantage is not the end of the inquiry. On the constitutional merits, one might decide that racial preferences are unwise, and yet vote to defer to the university's decision. Discrimination against whites, though it may be unjust and undesirable, is much less vicious than what was done to blacks. A judge might believe, with Holmes, that he should be reluctant to declare unconstitutional a program that many reasonable people believe is desirable, especially if the judge thinks that they are not utterly irra-

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5. See *Why Are Blacks Paid Less?* 1 CONST. COMM. 191 (1984) for some surprising data on income by ethnic group.

tional in so believing. The judge might also believe, as I do, that diversity, freedom, and the individual responsibility they promote are constitutional virtues, not to be lightly overridden by a 5-4 (or 4-1-4) edict from Washington. It is "moral education," Thayer might have said, for thousands of professors and deans to bear responsibility for deciding between the claims of the Bakkes and the claims of the racial minorities. If it had been up to me, I might not have been persuaded by Thayer's logic in the context of *Bakke*. For I believe that preferential admissions are harmful, especially to the ostensible beneficiaries. But *Bakke* at least illustrates that Thayer's advice does not always favor the "conservative" side, and that "conservative" norms sometimes point in different directions. Most of all, it illustrates the folly of treating footnote four as a substitute for thought.

A common "realistic" argument is that judicial restraint is essentially a position on the merits, since it determines the result. This argument proves too much, for the same can often be said of democracy in general: by choosing a democratic system we have foreclosed dozens if not hundreds of policies that are possible only under a dictatorship—for example ruthless collectivism, a large peacetime army, or abolition of social security. To be a democrat is to accept that price. Of course, there is a sense in which a court that upholds the legislature's resolution of an issue is influencing the outcome by upholding the outcome. But if this truism is to be more than a shallow semantic point, one must show that it is more important to solve the problem "correctly" than to solve it democratically.

Now what about environmental rights? Again, judicial activists can make an impressive argument that the political process is seriously flawed. The politicians are often swayed by corporate money; they find dozens of ways to avoid accountability; they respond to irate property owners much more readily than to amateurs with a cause; they sometimes sacrifice the well-being of our descendants for the sake of today's voters; they mirror the parochial interests of their little constituencies—a city, a county, even a state government does not adequately respond to environmental issues that transcend political boundaries. The government sometimes has a vested interest in environmental degradation—witness the Army Corps of Engineers. Even the most conscientious bureaucrats, charged with environmental responsibilities, often must placate politicians who control their appropriations, and who in turn are controlled by constituents—from county governments to farmers to timber companies—that fiercely resist even reasonable regulations.

Nevertheless, I am against creation of a right to a decent environment. While conceding that some major exceptions should be made to Thayer's prescription, we should not forget that politics is always unfair in some sense. The winners invariably have some "improper" advantages: more money; incumbency; the greed, prejudice, and ignorance of the populace; the personal characteristics of the politicians (disproportionately male, middle-class, white, lawyers, and so on), or of the members of key committees (your scenic rivers bill may need the approval of the farmers who control the "Agriculture and Natural Resources" committee, or of a finance committee dominated by conservatives); the myriad difficulties of amateur lobbying; the fact that legislative procedures make it far easier to block legislation than to pass it. If Thayer's prescription is to apply at all, it must apply to many issues where the political contest is arguably unfair.

Usually, both sides will have some unfair advantages. (One's own advantages always seem eminently just, if indeed they are not taken to be signs of divine approbation.) In the sixties and early seventies environmentalists, though severely handicapped in other ways, were borne aloft by one of the most spectacular tidal waves of publicity in American history. My prejudices are with the backpackers, but there's no denying that the publicity was massively one-sided. For ten years or so relatively few journalists or authors raised such questions as the effect of environmental regulations on utility and housing costs. Although we do not normally describe literature as an "unfair advantage," this free publicity must have been worth billions of dollars. True or false, fair or unfair, it certainly served to offset many of the advantages of those who resisted regulations. In consequence, many strict environmental regulations were adopted, without a constitutional right to a decent environment. Yet in 1960 or thereabouts, on the eve of this decade, a judge might well have concluded that environmentalists needed, as the title of a book by William O. Douglas put it, *A Wilderness Bill of Rights*. The publicity itself, cause and symptom of growing power, spoke of the citizens' powerlessness.

If a majority of the Supreme Court had made such a mistake, and created a right to a decent environment, what would the constitutional historians say about it today? Probably that it was yet another example of the Court's historic role as guardian of the rights that politicians neglect. They would be able to show that the Court intervened only after many decades of shameful political inaction. The Justices ordered the states (let us assume) to adopt minimum standards of air and water quality, ushering in one of the most cre-

ative, tumultuous, and ultimately inspiring decades in the history of American government. Prompted by the Court's bold decisions, the politicians finally began to respond to the quiet crisis they had previously ignored. Although at first they evaded and temporized, they eventually fashioned—in creative conflict and finally cooperation with the courts—a solid foundation of environmental law.

As we now know, such history would have been profoundly mistaken: the Court would not have been the cause of the environmental revolution. It would have happened anyway. But the Justices would have seemed to be the essential catalyst. This points up a common fallacy in constitutional history: we almost always assume that if the Court had not acted the problem would not have been addressed. In many cases, no doubt, this assumption is accurate. Yet sometimes, by removing an issue from the political arena, the Court may have perpetuated the political torpor that the historians later cited as a justification for its intervention. For example, if the Justices had not undertaken to supervise state regulation of interstate commerce, maybe Congress eventually would have created an administrative agency for that purpose. This might have been superior to judicial review. We cannot know.<sup>6</sup>

Today scholars generally define the appropriate occasions for judicial restraint by reference to the subject of the case—economic regulation, for instance. Thayer had a different approach. He thought that the Court should not declare a law unconstitutional except when there was no reasonable doubt.<sup>7</sup> If he meant that anything which can be defended with a show of reason is constitutional, then he went too far. But I wonder whether the Justices have gone too far toward the other extreme. Let me return to my complaint about a trivial Constitution. Judicial dogmatism is one of the causes of trivial rights. I will rephrase Thayer's idea: the problem, I suspect, is not that the Justices invalidate laws and practices about whose constitutionality *they* have reasonable doubts; it is that they don't always have the doubts that they ought to have. By and large, the Court's decisions may more justly be criticized for dogmatism than for lawlessness.

To be sure, trivial rights are also a measure of the security of our truly basic liberties. We do not try to burn atheists; so our constitutional cases have to do with nativity scenes instead of heretics at the stake. Socialists are free to speak, so the constitutional frontier becomes nude dancing.

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6. The point was made in Auerbach, *supra* note 3, at 150-51.

7. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

Symbols are important, and a case may be "merely symbolic" without being trivial. Then too, petty rights may be the plate armor of great rights, deflecting repression before it reaches the heart of our system.

Still, it is a constitution they are expounding. If the Court were to establish a constitutional right to a decent environment it would soon be asked to decide precisely how many milligrams per liter of various pollutants should be discharged into the Mississippi. Legalistic arguments against such decisions would miss the point. Thayer said it better.

#### IV

In the academy, constitutional jurisprudence has become exceedingly sophisticated. One may express reservations, as I have done, and certainly one can poke holes in particular theories. But on the whole we are entitled to feel superior to columnists, politicians, and other lay commentators. Our political opinions, on the other hand, strike me as much less impressive. Precisely because constitutional law is indeed partly politics, this is a serious charge. Oddly, many modern constitutional thinkers are not interested in messy, legislative facts, even though they want the Court to address a multitude of social problems. In Brandeis's time, reformers were perhaps too inclined to believe that the facts are clear and that they speak for themselves. Their mistake, if mistake it was, hardly justifies going to the other extreme, by trying to solve all constitutional issues dogmatically. Naïve politics is worse than naïve law.

The political side of the New Formalism tends to be uncritically statist in its treatment of economic regulation. For example, to appraise the *Lochner* era by a political criterion, we need to decide whether the regulations that the conservative Court struck down were on the whole good laws. Contrary to what one gathers from most histories of that period, the answer is not at all clear.<sup>8</sup> Nor is it clear that we should approve all of the statutes that the conservative Court upheld. What about the *Muller* law, which as you know did not apply to men? Or the minimum wage for women in *Adkins*? What about the New Deal laws that the Nine Old Men invalidated? Or the ones that they upheld? For example, how many teachers of constitutional law discuss the possibility that *Blaisdell* was a harmful decision? I suppose that most of us tacitly assume that the decision was right as a matter of economic policy, and questionable only by legalistic reasoning. I doubt that we give

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8. See, e.g., Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281 (1984).

adequate attention to the economic case against mortgage moratoria. What if their effect is to make credit more difficult for farmers to obtain?<sup>9</sup>

In the nonlegal literature, one can find considerable evidence that the value of some of these statutes was problematic. Constitutional scholars, on the other hand, generally imply that the laws were desirable, but without adducing any evidence. Those who advocate judicial restraint have an adequate excuse for gliding past the legislative issues, but others do not.

Realists usually stress the indeterminacy of constitutional meaning and the manipulability of doctrine. It seems to me that most of the issues that come before the Court are at least as difficult in their legislative dimension as in their narrowly legal dimension. Some scholars, though skeptical of old-fashioned legal reasoning, have supreme confidence in their political intuitions, expressed as moral imperatives. Their combination of legal nihilism and political faith is psychologically understandable. "Tolerance," wrote Learned Hand, "is the twin of incredulity." If you think that the Fate of Mankind depends on whether your political program is enacted, you are likely to regard people like Thayer as excessively prissy or even as sinister apologists for the status quo. You are likely to favor activism if and only if it advances your causes. If, on the other hand, you believe that politics is a quest for the least lousy solution; that most plausible theories are wrong; that there are plenty of fools and scoundrels in every crowd; and that constitutional decisions are not even close to being one of the major determinants of human happiness, then you are likely to prefer Thayer to many more recent constitutional theorists.

While we are under its spell, the cause of the moment always seems to be perfectly valid, long overdue, and terribly important, more so than any jurisprudential theory. History sometimes verifies that judgment, but it always adds doubts; and often the cause eventually looks misguided. Yesterday's enlightened constitutional causes included protection of women, eugenics, the minimum wage, zoning, and a free hand for the President in foreign affairs. There is something to be said for each of these, but not nearly as much as liberals once thought. One hopes that our causes will look better to our constitutional heirs than these old causes look to us.

It is a mistake to assume that impersonal legal logic necessarily leads to more conservative results than judicial statesmanship. Legalism argues against a revival of substantive economic due process.

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9. See *Farm Foreclosure Moratoria and the Contract Clause: An Economic Analysis*, 3 CONST. COMM. 331 (1986).

So does Thayer. But if we reject those grounds for restraint, much can be said in favor of economic due process. Although legal scholars customarily invoke a formalistic presumption that companies do not need judicial protection, the statute books are loaded with indefensible regulations; we sometimes forget that the pro-regulation side often represents dominant economic interests. Justices are as capable of appraising economic regulations as they are of appraising school busing and the like. Although it is customary to distinguish "economic" from "human" rights, common people may gain more from decisions of which the nominal beneficiaries are companies, than from some of the more glamorously egalitarian decisions. Since capitalism seems to be the foundation of republican government (necessary, though not sufficient),<sup>10</sup> one might even describe economic due process as the preferred freedom. That is, if Thayer was wrong.

Politics, we know, is the art of the possible. Yet the same sort of person who believes that law is merely politics usually also believes that the Supreme Court should have struck down all of the anti-subversive laws and practices that came before it after World War II. Would that have been politically realistic? To the extent that constitutional adjudication is truly political, the Court should be (must inevitably be) a fox as well as a lion. The course it actually followed was arguably very clever politics: in cases like *Yates* and *Scales* it fought a guerilla war against repressive legislation instead of launching a reckless frontal attack.

The just compensation clause needs a careful political analysis. Literally construed, it seems to prohibit only physical expropriation. On this basis, one might argue that the concept of regulatory takings is an unwarranted judicial invention. Here it is the liberals who are the strict constructionists. Like other strict constructionists, they have a difficult position to defend. The "connotative meaning" of the clause, to borrow a term from Paul Freund, is not violated by extending it to regulatory takings. What good would it do to know that your land cannot be expropriated, if the government may prohibit you from using it? (And tax you for owning it.)

On the other hand, if the concept of regulatory takings is bad for society, I see no irresistible legalistic reason for retaining it. The distinction between seizing land and prohibiting its use is thin but perhaps not altogether unreal, especially if the landowner is allowed to camp, to stroll around, and to exclude others, being prohibited only from developing the land. We have a genuine interpretive choice.

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10. See, e.g., P. BERGER, *THE CAPITALIST REVOLUTION* (1986).

If we move to another plane of argument, ethical theory instead of narrow legalism, the issue becomes even more complex. As a matter of abstract ethical theory, there are strong arguments on both sides. Some say that landowners should have no greater rights than those who want to regulate them. By draining your swamp you impose upon nature-lovers like me; by putting it in a zoning district where drainage and development are forbidden we impose upon you. In this political contest, the argument goes, the courts should be neutral, even if the zoning law has made the land worthless.<sup>11</sup>

The main trouble with this argument is that it is unrealistic, less as a matter of legal or ethical theory than as a matter of political reality.<sup>12</sup> As a theoretical exercise, one can devise a plan to preserve a state's environmental amenities by regulation, spreading the burden widely enough to make it look tolerably fair, perhaps even in those cases where a landowner is left with a nearly worthless tract. In most situations, however, this ethical argument will not correspond to reality, because what makes it politically feasible to do this to a landowner is the fact that the government is not doing it to many other landowners, and indeed others are commonly benefitting in some proprietary way from the regulation. The typical case of a regulatory taking arises out of parochial zoning, not out of a grand plan to redistribute wealth or save the environment. My guess is that, typically, the landowner who is left with a nearly worthless tract because of a zoning rule has been treated unfairly. Others who own equally scenic land, or equally valuable wildlife habitat, have been put in a district where development is allowed, or have received variances.

If I am right about all this, then the victims of regulatory takings are not usually great corporations; they are scattered landowners, affected by different regulations imposed by different local governments at different times. These people lack a practical way to cooperate politically. They also face legal difficulties: given the skimpy records in most zoning offices, discriminatory treatment normally will be impossible to prove. Even if the landowner does prove it, he probably will not be entitled to relief under the equal protection clause of the Federal Constitution.<sup>13</sup> While we lack adequate equal protection doctrine, the just compensation clause serves as a crude technique for preventing some extreme examples of this

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11. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

12. For a more elaborate study and analysis of this subject, see Bryden, *A Phantom Doctrine: The Origins and Effects of Just v. Marinette County*, 1978 A.B.F.R.J. 397.

13. See *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

kind of unfairness. Here again, political realism is more "conservative" than lawyers' logic. And here too, as in *Bakke*, conservative values are in conflict: to protect property rights, one must override local decisions. ("Liberal" values are also in conflict, since in other contexts liberals usually want to distribute social losses widely.)

To see the politics in law is not the end of wisdom; it is only the beginning. Politicians send millions off to die or be maimed in wars. Realistically, that price must sometimes be paid. Nothing could be less political, or less realistic, than to suppose that constitutional politics does not require the Court to make analogous painful choices. Yet those who stress realism the most are often the least prone to find moral ambiguity in constitutional choices. A "realist" is apt to be someone who, if the Court were to strike down a rent control ordinance under the due process clause, would object on the ground that rent control helps the poor. (If you don't see my point, get thee to a library.)

Desegregation deserves a careful political analysis. No constitutional decision is more inspiring than *Brown v. Board*; none attacked a more despicable evil. If constitutional law consists of eternal moral truths, then presumably we can all agree that *Plessy* was wrong. If it consists of legal truths that can be fully apprehended by lawyers' logic, the correct outcome is much less clear. But the legal argument against mandatory segregation was powerful—though not as good in *Plessy*'s time as in 1954. If, on the other hand, we approach it as a political problem, *Brown* and *Plessy* are obviously distinguishable. Political truth is contingent; it is never wise to ignore questions of means, effects, and timing. To appraise *Plessy*, we must ask (among other things) whether the races could have moved immediately from a master-slave relationship to one of complete equality before the law. Was that politically realistic? In politics timing is critical, and most idealistic aspirations are unattainable. We must weigh the likely extent and consequences of white resistance to decrees forbidding all de jure segregation, at that stage of our history. Chief Justice Warren, you may recall, acknowledged in *Brown* that *Plessy* may have been right in its time. Perhaps "the strange career of Jim Crow" could have been nipped in the bud; perhaps not. I am not perfectly sure of the answer, but I have the impression that so-called realists do not even consider the question. How can that be realistic?